

1 JUDGE ROBERT J. BRYAN  
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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA  
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10 UNITED STATES OF AMERICA, ) No. CR15-5351RJB  
11 Plaintiff, )  
12 v. ) REPLY TO GOVERNMENT  
13 JAY MICHAUD, ) RESPONSE TO REQUEST FOR  
14 Defendant. ) DISCOVERY HEARING AND  
15 ) GOVERNMENT MOTION FOR  
16 ) CONTINUANCE  
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**I. ARGUMENT**

Jay Michaud, through counsel, does not oppose the Government's request for additional time to brief and argue the issue of whether it must disclose the NIT code to the defense. *See* Dkt. 123 (Government Response to Request for Expedited Hearing) at 4. The defense, however, firmly opposes the Government's additional request that the Court postpone the January 22 hearing on Mr. Michaud's pending motions for suppression, *Franks* hearing and dismissal of the indictment.

First, as set forth in Mr. Michaud's January 11, 2016, Consolidated Reply, all of the facts relevant to the pending issues and motions are now before the Court. *See* Dkt. 111 at 29-34. Further, the Government has represented in its continuance request that discovery of the NIT code is not relevant to the pending suppression or *Franks* issues. Dkt. 123 at 3, ll. 26-27. While it is possible that defense analysis of the complete code, if ultimately allowed by the Court, will reveal new *Franks* issues (for example, if the NIT warrant application did not accurately describe the NITs functions or capabilities), the defense is prepared at this point to accept the Government's assurance that it is not

1 withholding discovery that relates to the pending suppression or dismissal motions.  
 2 Accordingly, at this juncture, discovery of the code is material to potential “chain of  
 3 custody” issues for data that the Government may seek to introduce at trial and  
 4 potential *Daubert* challenges to that evidence. Those issues, however, will be rendered  
 5 moot (for purposes of this case at least) if the Court grants Mr. Michaud’s motions for  
 6 suppression or dismissal.

7 Second, the defense recognizes that the Government has a legitimate interest in  
 8 litigating its assertion of a “qualified law enforcement privilege” for the code and any  
 9 sensitive law enforcement or national security interests that may be implicated by its  
 10 disclosure. Accordingly, the defense does not object to the Court setting a briefing and  
 11 hearing schedule on the discovery issue that will allow the Government sufficient time  
 12 to marshal and present its arguments. What the defense does object to, however, is the  
 13 Government using the emerging code discovery issue as a pretext for delaying the  
 14 Court’s resolution of the pending suppression and dismissal issues.

15 In this regard, it is important to note that the defense asked for discovery of the  
 16 NIT code last September; it filed a timely motion to compel disclosure of the code in  
 17 November (Dkt. 54); and the Government elected not to litigate that discovery request  
 18 or pursue its claim of an exemption prior to the December 14, 2015, hearing on the  
 19 discovery motion. In addition, on December 1 the Government requested (and the  
 20 defense did not oppose) a continuance and scheduling order that set a hearing on the  
 21 suppression and *Franks* motions for January 22. Dkt. 67 at 2. The Court adopted the  
 22 Government’s proposed schedule in its December 7, 2015, scheduling order. Dkt. 76.  
 23 Based on this scheduling order, one of the defense’s experts has canceled a previously  
 24 scheduled trip to Geneva and arranged to fly to Tacoma from the East Coast for the  
 25 January 22 hearing so that he will be available to consult with defense counsel during  
 26 the hearing and testify, if needed, as a rebuttal witness.

In short, setting aside any dispute about what the Government agreed to disclose before the December 14 hearing on the original motion to compel, the defense agrees with the Government about “the need to keep this case moving” (Dkt. 123 at 3), and Mr. Michaud therefore asks the Court to proceed with the January 22 suppression hearing as scheduled. The defense further requests that the Court enter an order setting a briefing schedule for the motion to compel NIT discovery that will allow the Government time to address the issues it has now raised, while at the same time allowing the case to proceed with an orderly and efficient resolution of the potentially dispositive issues now pending before the Court.

Finally, on January 14, the Government filed a superseding indictment against Mr. Michaud, adding a second count of receipt of pornography. Dkt. 117. Mr. Michaud requests that the Court add his arraignment on the new indictment to the January 22 calendar. Mr. Michaud will be entering a plea of not guilty to all counts.

Dated this 19th day of January, 2016.

Respectfully submitted,

*s/ Colin Fieman  
s/ Linda Sullivan  
Attorneys for Jay Michaud*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered with the CM/ECF system.

s/ *Carolynn Cohn*  
Paralegal  
Federal Public Defender